

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES D. DUNION and DEPARTMENT OF THE NAVY,
PHILADELPHIA NAVAL SHIPYARD, Philadelphia, PA

*Docket No. 98-608; Submitted on the Record;
Issued November 5, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective March 30, 1996; and (2) whether appellant has met his burden to establish that he is entitled to continuing compensation benefits on or after March 30, 1996.

The Board has given careful consideration to the issues involved, the contentions of appellant on appeal and the entire case record. The Board finds that the decision of the Office hearing representative, dated January 30, 1997, which affirmed the termination of appellant's benefits and remanded the case for further medical development to resolve the issue of whether appellant met his burden to establish that he is entitled to continuing compensation benefits on or after March 30, 1996, is in accordance with the facts and the law in this case and hereby adopts the findings and conclusions of the hearing representative.¹

The Board further finds that appellant failed to meet his burden to establish that he is entitled to continuing compensation benefits on or after March 30, 1996.

In accordance with the hearing representative's January 30, 1997 decision, the Office referred appellant, together with the relevant medical records, a statement of accepted facts and a list of specific questions, to Dr. Frank A. Mattei, a Board-certified orthopedic surgeon, for an

¹ The Office hearing representative specifically found that medical evidence submitted by appellant at the hearing was sufficient to create a conflict in the medical evidence on the issue of whether appellant continued to have residuals of his September 14, 1993 employment-related injury.

impartial medical examination to resolve the conflict in the medical opinion evidence pursuant to section 8123(a).²

In a letter decision dated October 3, 1997, the Office forwarded a copy of Dr. Mattei's report to appellant and advised appellant's attorney that based on the report of Dr. Mattei, as the impartial medical specialist, the Office's decision of March 14, 1995 terminating appellant's compensation benefits "remains affirmed."³

Once the Office accepts a claim, it had the burden of justifying termination or modification of compensation. After it has been determined that an employee is entitled to compensation benefits for an employment-related condition, the Office may not terminate benefits without establishing that the original determination was erroneous or that the employment-related residuals have ceased. Once the Office has met its burden of proof to terminate appellant's compensation benefits, however, as it has done in the instant case, the burden shifts to appellant to establish entitlement to continuing compensation benefits.⁴

The Board finds initially that, although the Office's October 3, 1997 letter did not properly contain appeal rights, it constitutes a final decision with respect to appellant's claim. The Office determined that based on the opinion of the impartial medical specialist, the Office's prior decision terminating appellant's benefits effective March 30, 1996 "remained affirmed." It, therefore, constitutes a final decision with respect to appellant's entitlement to continuing compensation and is subject to review by the Board.⁵

In his June 24, 1997 medical report, Dr. Mattei provided a review of medical records and a history of the accepted September 14, 1993 left shoulder strain and cervical strain. In response to the Office's question of whether the employee's current condition was causally related to the September 14, 1993 employment injury, Dr. Mattei stated:

"After a careful review of the above-medical documentation, along with the history given by the patient and my objective, orthopedic evaluation, it is my medical opinion, with a reasonable degree of medical certainty that we are dealing with preexisting conditions of the cervical spine which predated his accident of [September 14, 1993]. Thus, the mechanics of this transient injury of [September 14, 1993] is not the true cause of his pathology, but may have been a temporary exacerbation of his preexisting conditions as stated above, which should have responded to conservative measures within a 6 to 12-week period, returning him to his preinjury level of activity."

² 5 U.S.C. § 8123(a) provides that "If there is disagreement between the physician making the examination for the United States and the physician for the employee, the Secretary shall appoint a third physician who shall make an examination." A conflict was found between the September 18, 1995 report of Dr. Kathleen Maloney, a referral physician, and the December 19, 1996 report of Dr. Bruce Grossinger, appellant's physician.

³ The Board notes that there is no indication that the Office enclosed appeal rights with this decision.

⁴ *George Servetas*, 43 ECAB 424, 430 (1992).

⁵ 20 C.F.R. § 10.139 provides that final decisions of the Office are subject to review by the Board.

In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.⁶ As Dr. Mattei provided a well-rationalized opinion based on a complete medical and factual background, the Board finds that his report is entitled to special weight and establishes that appellant no longer suffers from residuals of his employment-related injuries.

The decisions of the Office of Workers' Compensation Programs dated October 3 and January 30, 1997 are hereby affirmed.

Dated, Washington, D.C.
November 5, 1999

George E. Rivers
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

⁶ *Nancy Lackner Elkins*, 44 ECAB 840, 847 (1993).